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**IN THE  
COURT OF APPEALS OF INDIANA**

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A.A.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 88A01-0608-JV-350
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

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APPEAL FROM THE WASHINGTON CIRCUIT COURT  
The Honorable Robert L. Bennett, Judge  
Cause No. 88C01-0408-JD-133

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**May 23, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

A.A. appeals his adjudication as a delinquent child for committing what would have constituted Class B felony child molesting by sexual intercourse if committed by an adult. We affirm.

## **Issue**

A.A. presents the issue of whether there is sufficient evidence to support the delinquency finding.

## **Facts and Procedural History**

A.B., born on August 22, 1991, became acquainted with A.A. in July of 2004 through her older friend, S.G. A.B. was twelve years old and in sixth grade at the time. A.B. told A.A. that she was a year younger than S.G. A.A. was born January 8, 1989, and was in high school at the time. S.G. had lived a couple houses down from A.A. for about a year and a half. A.A. never saw S.G. ride the bus or saw her at high school. A.A. had known S.G. for about eight months to a year prior to the incident.

After S.G. introduced A.B. to A.A. outside A.A.'s house, the three went for a walk to Guys 'n Dolls around the corner. When they arrived, A.A. gutted a cigar, stuffed the cigar paper with marijuana, lit it, and began smoking. A.A. offered it to S.G. and A.B. S.G. accepted while A.B. refused. Eventually, A.B. did smoke the marijuana-laced cigar. Then A.A. asked A.B. if she would have sex with him, to which A.B. said no. S.G. and A.A. proceeded to make fun of A.B. because she was still a virgin. Following the taunting, A.A. asked A.B. again about having sex. Not wanting to be labeled a "wussy" and feeling

pressured, A.B. finally agreed. Trial Transcript at 70.

The three walked back to S.G.'s house, and S.G. went inside. A.A. led A.B. behind a bush and placed his jacket on the ground. A.A. told A.B. to take her pants off, and then they had sex.

The State filed a delinquency petition alleging that A.A. committed what would have been child molesting by sexual intercourse had he been an adult. After the factfinding hearing on September 7, 2005, the trial court entered a finding of delinquency. A.A. now appeals.

### **Discussion and Decision**

A.A. contends that there was insufficient evidence to establish that A.A. sexually molested A.B., because A.A. reasonably believed that A.B. was sixteen. When the State seeks to have a juvenile adjudicated to be a delinquent for committing an act which would be a crime if committed by an adult, the State must prove every element of the crime beyond a reasonable doubt. J.S. v. State, 843 N.E.2d 1013, 1016 (Ind. Ct. App. 2006), trans. denied. In reviewing a juvenile adjudication, this court will consider only the evidence and reasonable inferences supporting the judgment and will neither reweigh evidence nor judge the credibility of the witnesses. Id. If there is substantial evidence of probative value from which a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt, we will affirm the adjudication. Id.

Indiana Code Section 35-42-4-3(a) provides: A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual

conduct commits child molesting, a Class B felony. Thus, the State was required to show that A.A. knowingly performed or submitted to sex with A.B., who was less than fourteen years old. Under this statute, the defendant's knowledge of the alleged victim's age is not an element of the crime.

Indiana Code Section 35-41-3-7 sets forth a generally-applicable mistake of fact defense: "[i]t is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense." Subsection C of I.C. 35-42-4-3 provides for such a defense to a charge of child molesting in particular: "It is a defense that the accused person reasonably believed that the child was sixteen (16) years of age or older at the time of the conduct."

Both briefs center their arguments on whether A.A. knew A.B. was less than sixteen years old. However, this Court recognized in Lechner v. State that when the legislature amended the child molestation statute in 1994, eliminating subsections addressing offenses against children between 12 and 16 years of age, the legislature failed to accordingly amend the "reasonable belief" defense subsection. 715 N.E.2d 1285, 1287 (Ind. Ct. App. 1999), trans. denied. This court concluded that this oversight was a scrivener's error. Id. Thus, the mistake of fact defense is available to a defendant who reasonably believes the victim to be of such an age that the activity engaged in was not criminally prohibited. Id. Therefore, the question here is whether A.A. reasonably believed that A.B. was fourteen years or older.

The mistake of fact defense admits all the elements of the crime but provides circumstances excusing the defendant from culpability. Moon v. State, 823 N.E.2d 710, 715

(Ind. Ct. App. 2005), trans. denied. Because such a defense only addresses the defendant's culpability and not an element of the offense, the defendant has the burden to prove the defense by a preponderance of the evidence. Id. A.A. is appealing from a negative judgment. To prevail, the appellant must establish that the judgment is contrary to law. In re D.Q., 745 N.E.2d 904, 909 (Ind. Ct. App. 2001). A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from that evidence lead to but one conclusion, but the trial court has reached a different conclusion. Id.

A.A. testified at the factfinding hearing that he thought A.B. was fifteen or sixteen, because A.B. was "hangin' around with [S.G.]" He said that before the incident S.G. told him that she was sixteen. If true, this would have made S.G. older than A.A. at the time of the incident, because at that time A.A. was fifteen. Yet, A.A. also testified that despite living a couple doors down from S.G. for over a year, he never saw her ride the bus or saw her at high school. A.B. testified that she told A.A. that she was one year younger than S.G. From this evidence, one could conclude that A.A. believed A.B. was fifteen or that he believed she was thirteen or younger. Therefore, A.A. has not shown that the evidence is without conflict and that all reasonable inferences lead to a conclusion that is different from that of the trial court.

Affirmed.

SHARPNACK, J., and MAY, J., concur.